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Supreme Court of the United States

October Term, 1973

No. 73-566

JOHN P. BAUER,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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Preliminary Statement

This brief is in response to a petition for a writ of certiorari seeking review of a judgment of the Court of Appeals of the State of New York, rendered July 5, 1973, unanimously affirming without opinion a judgment of the Supreme Court, Appellate Division, First Department, rendered March 26, 1973, which unanimously af-

firmed without opinion a judgment of the Supreme Court, New York County, rendered September 27, 1971, convicting petitioner, after a jury trial, of attempted eavesdropping (former N.Y. Penal Law §738) and sentencing him to imprisonment for a term of six months (ARNOLD FEIN, J., at trial and sentence), which sentence the Appellate Division reduced to sixty days.

Petitioner remains at liberty on a stay of execution of judgment pending this Court's disposition of the petition for certiorari.

Question Presented

Whether the Court of Appeals correctly decided that petitioner was not deprived of a speedy trial by reason of his affirmative request for, or acquiescence in, the numerous pretrial adjournments of his case.

(In an order dated October 11, 1973, the Court of Appeals amended the remittitur to reflect that it had necessarily passed upon a federal constitutional question, to wit, "Defendant-appellant argued that the four-year delay from the time of his indictment to the time of his trial constituted a violation of his right to a speedy trial in contravention of the Sixth Amendment to the United States Constitution. The Court of Appeals held that appellant's constitutional rights were not violated").

Statement of the Case

In a five-count indictment filed on January 30, 1967, petitioner John P. Bauer, together with John Broady, Harold Getting and Francis Kennedy, was charged with attempted eavesdropping in violation of former New York Penal Law §738, tapping a telephone line in violation of former Penal Law §1423(6), and conspiracies to commit those crimes (Ind. No. 4844½, superseding Ind. No. 4844, filed on December 16, 1966). The indictment was one of many indictments charging unlawful eavesdropping and wiretapping which grew out of a two-year investigation by the New York County District Attorney's Office, and which were announced in December of 1966.

In brief, it was charged that Bauer employed Broady, Getting and Kennedy, and one Walter Miller, to install eavesdropping devices in the offices of his former business partners at the BNS International Sales Corporation in downtown Manhattan. After making one of these installations, Walter Miller was discovered by detectives of the District Attorney's Office Squad, and agreed to work as an undercover agent in return for consideration at the time of his sentencing. He was instrumental in securing many of the indictments and convictions that grew out of the two-year investigation, and was the principal witness at the trial of petitioner Bauer.

Codefendants Broady and Getting pleaded guilty prior to trial, and Kennedy was discharged on his own recognizance. After a separate trial, Bauer was convicted of one count of the indictment, and was sentenced on September

27, 1971 to imprisonment for six months. (The evidence at Bauer's trial was voluminous, and for the sake of brevity and convenience it will not be summarized in this brief, since the petition raises no issue respecting the evidence or conduct of the trial; a full summary of the evidence is contained in respondent's brief in the Court of Appeals.)

Before the Appellate Division, Bauer contended that the People's proof was rendered fatally defective by what he claimed to be a lack of evidence as to the operability of the eavesdropping device underlying his conviction; that the evidence showed him to have been entrapped as a matter of law; that he was deprived of his right to a speedy trial; and that his sentence was excessive. The Appellate Division affirmed his conviction unanimously and without opinion, in an order which reduced the sentence to sixty days. *People* v. *Bauer*, 41 A.D.2d 732 (1st Dept. 1973).

Leave to appeal to the Court of Appeals was granted by Chief Judge FULD in an order dated April 4, 1973. In that court Bauer abandoned his argument with respect to the operability of the eavesdropping device and also did not raise the issue of entrapment. Instead, he contended that the proof of his guilt was fatally devoid of evidence of the eavesdropping victim's non-consent; that the trial court erroneously declined to charge the jury on the offense of possession of eavesdropping instruments; that he was deprived of a speedy trial; and that his sentence, even as modified by the Appellate Division, was excessive. On July 5, 1973, the Court of Appeals unanimously affirmed the judgment of conviction without opinion. *People* v. *Bauer*, 33 N.Y.2d 624.

POINT

The Court of Appeals having found from the record that petitioner was not deprived of his right to a speedy trial because he affirmatively caused, or acquiesced in, the numerous pretrial adjournments of his case, no substantial federal question is presented which this Court ought to review.

It is apparent from the manner in which the speedy trial issue was framed in the Court of Appeals and from that court's no-opinion rejection of the claim, that in reaching its decision the Court of Appeals did not construe or apply the Sixth and Fourteenth Amendments any further than was required for its conclusion that petitioner waived his rights under these amendments because he affirmatively caused or acquiesced in the numerous pretrial adjournments of his case. Issue was joined by the parties not on the question whether a delay of four years between indictment and trial was unconstitutionally long, but on whether the record showed petitioner to have caused or acquiesced in the delay and thus waived his right to complain of it. Thus the Court of Appeals made a factual decision, on the basis of the record before it.* The only reviewable issue is whether the court's decision is supported by the record, and that issue is not a substantial federal constitutional question which this Court ought to review. Supreme Court Rule 19. Moreover, it is clear from a summary of the

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* Before allowing the appeal to be heard, the Appellate Division had seen fit to require, at respondent's instance, that Bauer include in the record on appeal copies of the minutes of all the pretrial adjournments (order dated August 10, 1972).

proceedings that petitioner caused or consented to the post-indictment adjournments:*

—A superseding indictment was filed on January 30, 1967, and Bauer pleaded not guilty to that indictment on February 23rd; at that same court appearance he moved for inspection of the Grand Jury minutes and an order for speedy trial and, with his consent, the matter was adjourned to March 10th (mins. of February 23, 1967).

—The next adjourned date for which minutes have been supplied is October 23, 1967. On that date the court was informed that Bauer—free on bail from the day of his arrest until the conclusion of the trial—was in Europe, and that it had been agreed between his counsel and the assistant district attorney that he need not return for the day's court appearance. Without his objection the matter thereupon was adjourned to November 20th (mins. of October 23, 1967).

—On the November 20th adjourned date the People announced that they were ready for trial. Bauer again was

* The crimes for which petitioner was indicted occurred in July of 1965; the indictment against him was filed on December 13, 1966, the same day that the District Attorney's two-year investigation of illegal wiretapping was concluded and indictments against numerous individuals were announced. To have filed the indictment against Bauer prior to this date would have exposed Walter Miller's role as an undercover agent and jeopardized the entire investigation (see, *e.g.*, 435-48). Thus, the initial one-and-a-half-year period between crime and indictment was perfectly justifiable and, in any event, the Sixth Amendment's guarantee of a speedy trial does not apply until one has become an accused. *United States* v. *Marion*, 404 U.S. 307 (1971); *accord, Hoffa* v. *United States*, 385 U.S. 293, 310 (1966) ("There is no constitutional right to be arrested"); *United States* v. *Ewell*, 383 U.S. 116, 122 (1966) ("the applicable statute of limitations * * * is * * * the primary guarantee against bringing overly stale criminal charges"); *United States* v. *Cadarr*, 197 U.S. 475, 478 (1905).

in Europe, his counsel explaining that the assistant district attorney had "consented graciously to permit that to be." Counsel for Bauer then moved for an adjournment to "a date in January," which the prosecutor opposed as "too long," saying "I would like to dispose of this case." A compromise was reached whereby the matter was adjourned —in the court's words—to "December 5th at the defendant's request" (mins. of November 20, 1967). That date saw the case adjourned to December 12th with the consent of Bauer's attorney (mins. of December 5, 1967), and from December 12th to January 3, 1968, due to the pendency of defense motions (mins. of December 12, 1967), and from January 3rd to January 12th, again due to pending defense motions (mins. of January 12, 1968). In each instance Bauer's counsel either consented to or acquiesced in the adjournment, and in no instance was Bauer actually present in court.

—An associate of Bauer's attorney requested and received, on the January 12th adjourned date, further adjornment to January 23rd because Bauer's attorney of record was actually engaged in another trial (mins. of January 12, 1968). That adjourned date saw the attorney of record request and receive a further adjournment to January 31st (mins. of January 23, 1968). The next adjourned date for which minutes have been supplied is May 1, 1968. On that occasion—over the prosecutor's strenuous objections—the attorney representing Bauer and his codefendants achieved adjournment of the matter to the September Term (mins. of May 1 and May 8, 1968).

—The case appeared on the calendar again on September 3, 1968, at which time the death of a codefendant's counsel required an adjournment for substitution of counsel, and

the matter was put over to September 9th (mins of September 3, 1968). On that date substitute counsel still had not been retained, requiring an adjournment to September 25th to which all defendants consented (mins. of September 9, 1968).

—The next adjourned date for which minutes have been supplied is October 28, 1968. On that date neither Bauer nor his counsel was present in court and an adjournment to November 18th was ordered (mins. of October 28, 1968). The minutes of that date reveal only that the case was called and there was an adjournment to December 4th by consent (mins. of November 18, 1968).

—The next adjourned date for which minutes are available is April 18, 1969. On that date it became apparent that prolonged adjournments were imminent because of the continued engagements on trial of Maurice Edelbaum, Esq., counsel for codefendant John Broady. Appearing in Mr. Edelbaum's stead, Mr. Feitell [Bauer's attorney on appeal] stated, "I'm ready now to make a commitment on behalf of Mr. Edelbaum for an early fall date, and that's the best I could do this morning, Judge." The assistant district attorney rigorously opposed such a lengthy delay, and it was arranged that Mr. Edelbaum would come into court on April 24th to give his commitment on a trial date (mins. of April 18, 1969). He did not appear on that date, but his representative committed him to a trial date in the early fall. In the meantime, the cases were marked to follow a case then on trial in that part (mins. of April 24, 1969). Thereafter, when the cases appeared on the calendar they were marked ready and passed (mins. of April 28 and July 8, 1969).

—The calendar call on August 1, 1969, revealed that Bauer was in Europe in violation of his bail conditions, and the matter was adjourned to September 5th, the court directing that Bauer's bail would be forfeited if he failed to appear on that date (mins. of August 1, 1969). Petitioner has not supplied the minutes of that adjourned date. On the adjourned date of September 17th, one of the codefendants moved for a stay of the trial pending the decision of this Court in *United States* v. *White*, a case involving the use of undercover agents (since decided, and reported at 401 U.S. 745 (1971)); decision on the motion for a stay was reserved, and the matter was put over to September 19th, and on that date to September 24th (mins. of September 17 and 19, 1969).

The remaining three dates for which minutes have been supplied show the non-appearance of the defendants and their counsel (mins. of January 19 and 26, 1970; April 20, 1970). In January of 1971 the case against petitioner went to trial.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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